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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re Marriage of BRIAN GREGORY and DEBRA ANN DEVRIES.	
BRIAN GREGORY DEVRIES, Appellant, v. DEBRA ANN DEVRIES, Respondent.	G041096 (Super. Ct. No. 05D005748) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Clay M. Smith, Judge. Affirmed in part, reversed in part, and remanded.

Law Offices of Marjorie G. Fuller, Marjorie G. Fuller and James L. Keane for Appellant.

Law Offices of Albert M. Graham, Jr., Albert M. Graham, Jr., for Respondent.

In this marital dissolution action, Brian Gregory DeVries asserts the family law court erroneously valued his construction business in determining the amount of spousal support he should pay to Debra DeVries.[1] Brian also maintains the court erred in dividing real property, ordering retroactive spousal support, and requiring he pay Debra's attorney and expert fees. We affirm the judgment, except as to the spousal support award. The orders of spousal support and spousal support arrearages are reversed, and the matter is remanded as directed for another hearing on these issues.

I

The couple were married in June 1978, and separated in March 2005. Debra petitioned to dissolve the marriage on June 21, 2005. They have three adult children. After a three day trial, the court in August 2008 entered the following dissolution judgment:

Business Valuation: The court determined Brian DeVries Construction, Inc. (the Construction Company) had a value of $850,000 on December 31, 2005. It explained this figure was comprised of an asset value of $750,000 and a goodwill value of $100,000. The court awarded the business to Brian as his sole and separate property.

Real Property Assets: The couple owned real property in Lake Forest and Dana Point, California. The court awarded the Lake Forest property to Brian as his separate property, and determined its net equity to be $323,000 (fair market value of $575,000 minus the mortgage balance of $252,000). The court awarded the Dana Point property to Debra, and determined its net equity to be $352,000 (fair market value of $650,000 with a mortgage balance of $298,000).

Real Property Charges and Credits: The court determined it was appropriate to allocate a charge of $34,000 to Debra pursuant to *In re Marriage of Watts*

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[1] For the sake of convenience and clarity, and not intending any disrespect, the parties will be referred to in this opinion by their first names. (*In re Marriage of Balcof* (2006) 141 Cal.App.4th 1509, 1513, fn. 2.)

(1985) 171 Cal.App.3d 366, 373-374 (reimbursement to the community for the value of one spouse's post-separation-exclusive-use provision of a community asset). It stated, "This sum represents the amount by which the value of [her] post-separation use of the Dana Point [p]roperty exceed[ed] the value of [Brian's] post-separation use of the Lake Forest [p]roperty." In addition, the court awarded Brain an *Epstein* credit for payments he made from his separate property towards debts incurred by the Lake Forest property in the amount of $64,192 and for the Dana Point property in the amount of $75,310. (See *In re Marriage of Epstein* (1979) 24 Cal.3d 76, superseded by statute on another issue.)

Automobiles: The court concluded the Construction Company purchased automobiles for the adult children, and the parties had agreed those would be gifts from the community. Accordingly, the court determined "no further adjustment [needed] to be made concerning the [children's] automobiles." The court awarded Debra the couple's 2002 Chrysler automobile as her sole and separate property.

Spousal Support: The court concluded the earning capacity of the parties was "very disparate." Debra was working full time at her earning capacity of about $2,400 per month. Whereas, Brian "has available funds of $15,000 a month based on the analysis of the [Evidence Code section] 730 expert and his lifestyle." After taking into account the medical conditions of both parties, the length of the marriage (27 years), and their lifestyle during marriage, the court ordered a permanent spousal support of $3,500 per month. It determined the support would be retroactive to August 1, 2005, calculating the arrearages to be $129,500. The court also ordered Brian to provide Debra with health insurance. The court stated it would retain jurisdiction over the spousal support issue.

Fees: The court split the fees equally. The jointly retained forensic accounting firm was owed $26,300, of which Brian had already paid $8,000. Therefore, the court ordered Debra to pay $17,150 and Brian to pay $9,150. The real estate appraiser, James Willard, billed a total of $1,900, but because Brian had already paid $1,400, he must seek reimbursement from Debra for $450. Debra must also pay Willard

$500 (the unpaid balance on the account). The court ordered Brian to pay a portion of Debra's attorney and expert fees in the amount of $60,000.

Other Assets: The court equally divided the 401K retirement accounts. Brian no longer had to pay for Debra's term life insurance policy.

Equalization Payment: The court attached a worksheet to the judgment showing how it determined Brian owed Debra an equalization payment of $323,749. The worksheet noted the payment did not include spousal support arrearages or attorney fees awarded to Debra. The court ordered, "The entire amount owed and unpaid shall be secured by the real property known as the Lake Forest property. Counsel for [Brian] shall be permitted to review and approve any lien place[d] on the property. Once all payments have been made, [Debra] will execute a release of lien. In the event that [Brian] wishes to refinance the property to lower the interest rate on any prior mortgage, [Debra] shall cooperate with such refinance. In the event [Brian] refinances the property to obtain funds, [Debra] shall be paid first until she is paid in full from this property or otherwise." Finally, the court ordered, "This equalization payment shall now equalize the distribution of community and separate property. The equalization payment shall be made within 90 days after [n]otice of [e]ntry of [j]udgment if neither party has filed a [n]otice of [a]ppeal . . . ."

II

Brian attacks several facets of the court's valuation of his construction business, claiming the court's ruling is not supported by substantial evidence. We disagree, and address each contention in turn.

Goodwill Determination

In the trial court, the parties proceeded on the assumption the Construction Company had goodwill but disputed whether the goodwill had a value, and if so, what amount. "The goodwill of a business is the expectation of continued public patronage. (Bus. & Prof. Code, § 14100.) The following is a more complete definition: It is the

advantage or benefit which is acquired by an establishment beyond the mere value of the capital stock, funds or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers, on account of its local position, or common celebrity, or reputation for skill or affluence, or punctuality, or from other accidental circumstances, or necessities, or even from ancient partialities or prejudices. [Citation.] . . . it is the probability that the old customers will resort to the old place. It is the probability that the business will continue in the future as in the past, adding to the profits of the concern and contributing to the means of meeting its engagements as they come in. [Citation.]" (*In re Marriage of Foster* (1974) 42 Cal.App.3d 577, 581-582 (*Foster*), internal quotation marks omitted.)

"Goodwill is property of an intangible nature and is a thing of value. [Citation.] When it is sold it is not the patronage of the general public which is sold, but that patronage which has become an asset of the business. [Citation.]" (*Foster, supra,* 42 Cal.App.3d at p. 582, fn. omitted.) "Goodwill may exist in a professional practice or in a business which is founded upon personal skill or reputation. [Citations.] Accordingly, goodwill has been found to exist in a dental laboratory business [citation]; in an advertising partnership [citation]; in a medical practice [citations]; and in the law practice of a sole practitioner [citations]." (*Id.* at p. 582, fn. 2.)

"[W]hen goodwill attaches to a business its value is a question of fact. [Citations.] The courts have not laid down rigid and unvarying rules for the determination of the value of goodwill but have indicated that each case must be determined on its own facts and circumstances and the evidence must be such as legitimately establishes value. [Citations.] In establishing value of goodwill opinion evidence is admissible but is not conclusive. [Citation.] The trier of fact may also take into consideration the situation of the business premises, the amount of patronage, the personality of the parties engaged in the business, the length of time the business has

been established, and the habit of its customers in continuing to patronize the business. [Citation.]" (*Foster, supra,* 42 Cal.App.3d at pp. 582-583.)

As surmised by the court in *Foster*, "In sum we conclude the applicable rule in evaluating community goodwill to be that such goodwill may not be valued by any method that takes into account the post-marital efforts of either spouse but that a proper means of arriving at the value of such goodwill contemplates any legitimate method of evaluation that measures its present value by taking into account some past result. Insofar as the professional practice is concerned it is assumed that it will continue in the future." (*Foster, supra,* 42 Cal.App.3d at p. 584.)

The court appointed forensic accountant, Barbara Hopper, an associate of the firm Zacumen, Curren, Holmes & Hanzich, submitted a written report and testified at the trial. She used three different methods of goodwill analysis. Under the excess earning approach and the capitalization of earnings approach, the Construction Company had no measurable goodwill. Her third method, using three months of past gross profit rounded, rendered a goodwill value of $100,000. Hopper explained, "I took the gross profit number, because I felt that there [were] a lot of prerequisites between the sales number and getting to net income. So I felt the gross profit number was probably the cleanest number I had on the profit and loss statement. [¶] I looked and three months of gross profit is a little over $100,000. . . . [¶] I also compared that to cash flow [Brian received] . . . . [¶] I looked at his wages. He is making about $119,000 a year. [¶] I also looked at the income for the first six months of 2006. It was $148,000. I also looked at his cash flow statement [and on the average] . . . it's about $68,000." Hopper stated that based on the available California case authority, goodwill can be valued different ways as long as it is based on historical earnings rather than future earnings. (Citing *Foster, supra,* 42 Cal.App.3d at p. 584 [husband's medical practice had goodwill value of $27,000 based an accountant's approximation of the last three months received on

account]; *In re Marriage of Fortier* (1973) 34 Cal.App.3d 384, 388 [goodwill based on fair market value of goodwill paid by incoming medical partner a few years prior].)

Brian asserts Hopper's method of valuation is not one listed in the Statement of Standards on Valuation Services, Statement One, issued by the American Institute of Certified Public Accountants (AICPA). He asserts these standards do not approve of Hopper's rule of thumb type formula utilizing three months gross profits. Brian's forensic accountant, Jack Mark White, testified that under AICPA standard 39, it was improper for Hopper to rely solely on a rule of thumb method of valuation. Standard 39 provides, "Rules of Thumb. Although technically not a valuation method, some valuation analysts use rules of thumb or industry benchmark indicators . . . in evaluation engagement. A rule of thumb is typically a reasonableness check against other methods used and should generally not be used as the only method to estimate the value of the subject interest." White opined the Construction Company had goodwill, but under accepted formulas of valuation, it equaled zero in this case.

Brian asserts the courts in California have recognized the applicability of these "standards to the determination of legal issues." To support this statement, he cites a single case discussing an accountant's failure to follow the AICPA guidelines with respect to the "information and disclosures regarding the limited partnerships available to prospective investors by way of a confidential offering memorandum (COM)." (*Anderson v. Deloitte & Touche* (1997) 56 Cal.App.4th 1468, 1472.) The plaintiff's expert opined an extreme deviation from the AICPA standards raised a question of fact sufficient to defeat a summary judgment motion. (*Id.* at p. 1476.) The court agreed a triable issue of fact existed as to plaintiff's negligent representation cause of action, but summary judgment was proper as to the intentional misrepresentation claim given the lack of evidence of knowledge of falsity. (*Id.* at pp. 1477-1478.) The court did not embrace the AICPA guidelines as the benchmark for the applicable standard of care for

accountants. And nowhere did the court suggest the guidelines should trump established case authority.

We have before us a large body of case law holding goodwill is property of "an intangible nature[.]" And as such, "The courts have not laid down rigid and unvarying rules for the determination of the value of goodwill but have indicated that each case must be determined on its own facts and circumstances and the evidence must be such as legitimately establishes value." (*Foster, supra*, 42 Cal.App.3d at pp. 582-583.) The AICPA guidelines are instructive but not dispositive on the issue. Moreover, as noted by Debra the AICPA standards in question took effect January 1, 2008, almost two years before Hopper valued the business in 2005. Given the *Foster* court's approval of three months charges to accounts receivable to value goodwill in that case, it was reasonable for the court in this case to accept the expert's goodwill valuation based on three months of gross profits.

The Children's Automobiles

In her written report, Hopper determined three automobiles shown on the Construction Company books were gifted to the children in 2007. She included the value of these fixed assets ($58,655) in calculating the value of the corporation. Hopper noted in her report that Debra had not agreed to the gift, and therefore a downward adjustment was not warranted. At trial, Hopper testified the vehicles were on the business's books in 2005 and 2006. However, she stated it was unclear if the value of the cars should be included when valuing the business, clarifying she did not deduct their value but, "If the court can determine that those assets are not part of the business, then that's the amount that would need to be deducted. What I deducted was only [Debra's] car." In the judgment, the court concluded the cars were purchased by the business, but Debra and Brian agreed to give the cars to their children as gifts and therefore no further adjustments needed to be made concerning the automobiles.

Brian argues the court's failure to deduct the value of the children's cars contradicts its finding the cars were not company assets but gifts. He misstates the record. The court stated the cars were given as gifts, but it never said they were not company assets on the date of valuation (December 31, 2005). In fact, the court questioned Brian's expert after he opined the value of the cars should be deduced despite the fact they were still owned by the Construction Company on December 31, 2005. The court stated, "Now, I know this company is privately held, but let's say that somebody made arrangements on December 31, 2005 to acquire all of the stock; in other words, to buy all of the assets of the business by acquiring the stock in the corporate entity. They would indirectly acquire these vehicles too, wouldn't they?" The expert agreed the vehicles would be part of the corporate assets but nevertheless believed Brian should be given a credit for having later transferred those assets to his children. The court was not persuaded.

No one disputes Hopper's report stating the children's cars were on the corporation's books in 2005 and 2006 and gifted in 2007. As aptly surmised by Debra's appellate counsel, "A gift is not a gift, until it is given." The record shows Brian fought to have the business valued on a date closer to the date of separation, rather than closer to the date of trial. In 2007, he filed a motion and declaration requesting an alternative valuation date on the grounds that when he and Debra separated in 2005 "the business was not doing well, but had [the] potential to do well. We were experiencing a fairly large loss as a result of only one job." He stated the business experienced a small increase in profit and value over the next two years, due solely to his own skill, effort, and energy. Brian stated the resulting boost to the value of his business after 2005 should be considered his separate property. The trial court agreed and set a business valuation date of December 31, 2005. We conclude the court reasonably determined Brian should not be given both the benefit of a 2005 valuation date when the business was less profitable, and also given credit for a gift the business gave two years later.

Other Fixed Assets

Hopper's report valuing the business noted the company owned equipment carrying a book value of $95,162 but a current value of $56,886 (a difference of $38,276). On the same report, Hopper listed the company's vehicles as having a book value of $103,344 and a current value of $86,370 (a difference of $16,974). From the total book value of $198,506 for the fixed assets of equipment and vehicles, Hopper subtracted $55,250 to adjust for the depreciation in value.

At trial, Hopper was questioned about why she failed to attribute any value to some items of equipment still being used by the business (such as the $5,000 compressor and over $22,000 in tools, saws, & hammers), and why one particular piece of equipment, a 310 SG Backhoe Wheel Loader (Backhoe) significantly depreciated by more than half its purchase price. Hopper noted the current value figures in her report were not based on appraisals. Rather, she relied on Brian's estimates of the current fair market value for the various items. As for the Backhoe, Hopper stated it was purchased in May 2005, for $77, 294, and it was depreciated to a book value of $68,276 as of the date of valuation December 31, 2005. She stated Brian told her the Backhoe was currently worth only $30,000 ($54,887 less than the purchase price & $38,276 less than the book value). At the hearing, Brian testified the Backhoe was currently not worth very much because it had broken lights and it had not been properly cared for.

When making its ruling, the court rejected Hopper's decision to assign no value to some equipment, and to undervalue other assets. It started with Hopper's conclusion the business had slightly over $690,000 in net equity (the actual figure was $694,113). The court reasoned, "I think based upon this record it is clear that there are some miscellaneous assets in this business that have either been undervalued or not valued at all. Those aren't huge numbers, but there are some assets, tools, equipment, and so on, and they need to be taken into consideration. [¶] And so I am finding here

that the value of this business as of December the 31st, 2005 is $850,000 [$750,000 for the assets, and $100,000 for goodwill]."

In short, assuming the court used the rounded down figure of $690,000, then it increased the business's fixed asset value by $60,000 to account for the overlooked and undervalued items. (If the court used Hopper's actual starting calculation of $694,113, then the business's asset value was increased by $55,887 to account for the overlooked & undervalued items). The court orally pronounced its decision on the issues pending, but it did not specify what evidence supported the increase (which was either by $60,000 or $55,887 depending on the court's starting point). There was no written statement of decision, and Brian did not bring any alleged deficiencies or defects to the court's attention at the hearing.

On appeal, Brian contends the court erroneously doubled the market value of the equipment despite the lack of evidence the equipment carried such a value on December 31, 2005. He cites case authority holding an owner's opinion of the value of personal property is admissible on the issue of value. (See *Schroeder v. Auto Driveway Co.* (1974) 11 Cal.3d 908, 921 (*Schroeder*).)

Debra notes those same cases also state, "'The credit and weight to be given such evidence and its effect . . . is for the trier of fact.' [Citation.]" (*Schroeder, supra,* 11 Cal.3d at p. 921.) She argues the court, giving Brian the benefit of an earlier valuation date, reasonably gave her the benefit of a higher valuation for the equipment. She contends it was reasonable for the court to doubt Brian's opinion a backhoe purchased for over $77,000 in May 2005 had depreciated to $30,000 a mere seven months later (on the date of valuation December 31, 2005). The court could rely on Hopper's report and testimony noting there were tools still being used by the business purchased for over $45,000, and Brian valued them all as worthless. Specifically, the tax returns showed the business purchased a compressor for $5,000, tools for $20,000, one saw for $15,192, a Makita hammer for $1,026, and other equipment for $1,388. Debra

asserts it cannot be said the court abused its discretion in concluding Brian undervalued and failed to fairly value the business's assets by at least $60,000. Alternatively, she asserts any error was invited because it was Brian's burden to provide evidence of value.

"'Normally the trial court in the exercise of its broad discretion makes an independent determination of value based upon the evidence presented on the factors to be considered and the weight given to each.' (*In re Marriage of Bergman* (1985) 168 Cal.App.3d 742, 753 . . . [(*Bergman*)].) In *Bergman*, [the court] affirmed a valuation of the community interest in husband's pension at an amount which fell somewhere between the opinions of two expert witnesses. Although rejecting their conclusions, the trial court was presented with sufficient evidence in the course of the experts' testimony to reach its own independent determination. (*Id*. at p. 754.) [The court] distinguished *In re Marriage of Hargrave* (1985) 163 Cal.App.3d 346 . . . [(*Hargrave*)], where 'all evidence on the value of goodwill was rejected, leaving the trier of fact no basis on which to determine there was goodwill of a value of $35,000.' (. . . *Bergman, supra,* 168 Cal.App.3d at p. 753.) . . . ." (*In re Marriage of Hebbring* (1989) 207 Cal.App.3d 1260, 1273-1274 (*Hebbring*).) The case before us was not "barren of evidence" as to the value of the Construction Company's fixed assets. (Cf., *Hargrave, supra,* 163 Cal.App.3d at p. 355.) The trial court could have assigned a value independently determined from the evidence of the purchase prices and book values for the fixed assets.

If Brian wanted the court to set forth its calculations, or believed there were deficiencies, he should have requested a statement of decision on this issue. (*Hebbring, supra,* 207 Cal.App.3d at pp. 1273-1274; *Bergman, supra,* 168 Cal.App.3d at p. 754.) His failure to do so constitutes a waiver of the right to complain of such errors on appeal. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1132 (*Arceneaux*).) The court's failure to specify how it specifically arrived at $60,000 for undervalued assets is an omission which should have been raised and discussed at the trial court level in the first

instance. Applying the doctrine of implied findings, we conclude there was evidence from which the court could have arrived at its independent determination.

III

Brian contends the court erred by creating an inherently unequal division of the community estate. He asserts this inequity could have been remedied if the trial court had awarded the business to him and both real properties to Debra. Alternatively, Brian suggests the court could have awarded the business to him, the Dana Point property to Debra, "and ordered [the] Lake Forest [property] sold and the proceeds used to equalize division, with the court retaining jurisdiction to adjust the equalization figure after the sale." In essence, Brian is unhappy with being awarded the Lake Forest property because after the judgment was rendered the housing marking imploded. We dare say he would not be raising this argument if the house had appreciated significantly in value. In any case, we find the argument lacks merit.

The court awarded the business to Brian, the Dana Point property to Debra, and the Lake Forest property to Brian, but ordered Brian to pay Debra an equalization payment of $323,749. Brian thinks this was unfair because the equalization payment was essentially the net worth of the Lake Forest property ($323,000), and although the parties privately agreed it would be sold, Brian carried all the risk. He points to evidence the property needed $37,000 in repairs before it could be placed on the market, and the appraiser testified property values had been dropping in the Lake Forest area at approximately a rate of one percent a month. He asserts this court can take judicial notice of the fact home values and sales prices rapidly declined in Orange County since the March 2008 judgment.

Brian believes the court abused its discretion by failing to reserve jurisdiction over the sale of the Lake Forest property when such uncertainly existed as to its value. (See *In re Marriage of Munguia* (1983) 146 Cal.App.3d 853, 858-859 [court could not accurately value a community owned restaurant due to uncertainty over

whether it could obtain renewal of its lease].) In addition, he contends the use of a promissory note, rather than a cash payment, would have been more appropriate because he lacked the liquid resources to make an all-cash payment. (See *Bergman, supra,* 168 Cal.App.3d at p. 761 [approval of division where wife gained possession of family residence and owed $56,000 equalization payment through a promissory note for three years at a reasonable interest rate secured by a second deed of trust on the property].)

Debra contends what Brian is really asking for is a reevaluation of the community property's value, and she maintains if he prevails then *all* the community assets should be revisited to ensure an equal division. We agree, and conclude a reevaluation is not warranted. We remind Brian he received the benefit of valuing the community owned business at an earlier date, when it was worth significantly less. We doubt he would like to revisit that valuation. But more importantly we find no basis to order the trial court to re-value and re-divide all the assets. Trial courts cannot be held accountable for predicting real estate market fluctuations, or be required to determine for the parties all the details as to how the equalization payment would be best accomplished. At the hearing, Brian's counsel repeatedly requested the court award the Lake Forest property to Brian. He argued, "[Brian] would like the property, because he believes that it is a unique property and not easily replaced, either in this market or future markets." Counsel noted Brian had already spent $5,000 to start repairing the property. The court gave Brian what he requested, and reasonably left it up to Brian to decide whether to hold on to the property appraised at $575,000, refinance to lower the mortgage rate, refinance and cash out to repay Debra, or borrow the money from elsewhere. We conclude the trial court properly and fairly divided the two properties as valued at the time of judgment.

IV

Brian asserts the court improperly relied upon an assumption regarding his lavish lifestyle to impute income, unfairly increasing the award of spousal support. Hopper determined Brian's gross controllable cash flow from the business totaled

$119,244 per year. The trial court decided to increase this to $180,000 (approximately $5,000 more per month). It stated, "[Brian's] earning capacity is less certain [than Debra's] on this record. It's urged that he has . . . actual earnings of slightly under $10,000 a month. That's based on . . . Hopper's report. And although I certainly respect . . . Hopper's efforts and her report, the numbers—that just doesn't comport at all with his lifestyle."

The court determined Brian, postseparation, had "engaged, quite frankly, in this almost extravagant lifestyle. Although, he has been maintaining the mortgage and taxes and other expenses associated with two properties, he went out and purchased a third property, a separate property, for in excess of [$1] million . . . incurred an additional I think over $7,000-a-month obligation on that property. He does have someone living with him that contributes to that. I understand that." The court noted Brian also purchased a very expensive recreational vehicle (RV) and it did not believe Brian's testimony the RV was entirely for use as a job site office. The court explained, "The testimony was that it's a toy-hauler, meaning that it has storage in the back for off-road vehicles. [Brian] testified that he owned such vehicles. And I'm just not accepting the fact that this is just a mobile office. [¶] So [Brain's] . . . substantially expanded his lifestyle to a point that just could not possible be supported on the [$129,000] that [Brian] suggests. [¶] So based upon his lifestyle, I am going to impute to him that there is an income somehow, some way, whether it's considered corporate perks from the business or whatever, he has $15,000 a month available to him. [¶] That also addresses not only earning capacity, but marketable skills."

Relying on *In re Marriage of Loh* (2001) 93 Cal.App.4th 325, Brian argues a court cannot rely on his postseparation lifestyle to impute additional income. In *Loh,* the wife sought an increase in child support based on photographs portraying the husband's lavish lifestyle. Although he had lost his lucrative position as a stockbroker and was earning considerably less in his new career, he was being "subsidized" by the

income of a nonmarital partner with whom he was residing. The appellate court determined the wife had not presented sufficient evidence to justify an upward modification of husband's child support payment. It concluded the photographs failed to refute husband's income and expense declaration and tax returns. Wife had failed to take any measures to compel husband to produce documents concerning his financial status. The court reversed the order modifying support under the facts before it, and pronounced tax returns were a presumptively correct measure of income. It also held that in an appropriate case the expert testimony of a forensic accountant could serve to establish a parent's true income was not reflected on his or her tax returns. (*Id*. at p. 336.)

Debra argues this case is distinguishable from *Loh* and does not violate the principles discussed by that court. In this case, Brian produced financial documents and a forensic accountant opined Brian's income from the construction business included more than the reported wages on his tax returns. She argues the court merely imputed additional income from the corporation that Hopper failed to consider. The defect with this argument is the court imputed a substantial additional income to Brian without indicating its source. The trial court noted Brian's girlfriend was likely contributing to his opulent lifestyle, yet it is unclear if this factor was taken into account when the court tacked on an additional $5,000 a month ($60,000 a year) to Brian's income. The absence of a written statement of decision does not save the day when there is no evidence anywhere in the record to support the court's conclusion the accountant missed income of $60,000 a year. We appreciate the court's common sense approach that a man earning $119,000 a year could likely not afford to purchase a $1.2 million home, in addition to the mortgage payments on his existing two homes, plus a luxury toy-box motor home. But as in *Loh,* the court's $60,000 calculation is not supported by the record before us. (See *Loh, supra,* 93 Cal.App.4th at p. 327.) The spousal support order, and the spousal support arrearages order, are reversed and remanded for reconsideration.

We wish to clarify that on remand, it may be that the court will be able to clarify its reasoning and specify what financial record, bank statement, or other evidence shows Brian actually earns $60,000 more a year. Moreover, Debra may have collected evidence of income, unrelated to the new mate's income that should be considered on remand. But to impute income to Brain beyond that calculated by the forensic accountant ($119,000) a more detailed showing must be made.

V

Brian asserts the court's order requiring immediate payment of over $545,000 immediately was a clear abuse of discretion because there was no evidence he possessed the ability to do so. He misconstrues the record. Contrary to Brian's contention, there was no deadline stated in the judgment for Brian's obligation to pay a portion Debra's attorney and expert fees ($60,000) or the owed retroactive spousal support ($129,500). The only timeline contained in the judgment was for the $323,000 equalization payment. The court rejected Brian's proposal to make this payment over a 10-year period ($32,300 a year), and instead ordered the amount owed and unpaid would be secured by the Lake Forest Property and payable within 90 days unless Brian filed a notice of appeal. As Brian admits on appeal, it was the parties intention he refinance or sell the property to make the equalization payment. If he had not appealed, and had difficulty selling the property, there was no reason he could not have asked the trial court for an extension or payment plan. But since his appeal stayed the order, and he has presumably not paid Debra anything awhile waiting our decision, this issue can be revisited (if Brain requests it) on remand when the court evaluates Brain's income for purposes of calculating spousal support and arrearages. It cannot be said the court abused its discretion in requiring the equalization payment within 90 days given that it was anticipated Brian would appeal or utilize the Lake Forest property to pay his debt.

VI

We affirm the judgment, except as to the spousal support award. The orders regarding spousal support and spousal support arrearages are reversed and the matter is remanded for another hearing. Each party shall bear their own costs on appeal.

O'LEARY, ACTING P. J.

WE CONCUR:

MOORE, J.

ARONSON, J.